HIS MAJESTY THE KING.....PLAINTIFF; 1901

April 9.

AND

THE BRITISH AMERICAN BANK NOTE COMPANY..... } DEFENDANT.

Contract for Inland Revenue stamps—Production by method different from that specified—Recovery of money paid—Quantum meruit—Set-off against Crown—"Fair cost of production."

A contract between the Crown and the defendant company called for the production of certain inland revenue stamps printed from steel plates. The company delivered in lieu thereof stamps produced from steel transferred to stone. They were accepted, paid for and used by an officer of the Crown under the belief that they were produced by the process specified in the contract. The way in which the stamps were produced was subsequently ascertained, and the Crown sought to recover back the money paid therefor.

Held, that as the company had agreed to print the stamps from steel plates but printed them from stone, it did not produce the thing bargained for but another and different thing, and the Crown was entitled to recover back the money paid.

Semble: That in such a case the company could not recover from the Crown on a *quantum meruit* the fair value of the stamps produced from stone. *Wood* v. *The Queen* (7 S. C. R. 634); *Hall* v. *The Queen* (3 Ex. C. R. 373); *Henderson* v. *The Queen* (6 Ex. C. R. 39; 23 S. C. R. 425) referred to.

2. Revenue stamps are not articles of merchandise, and have no commercial value.

3. The company's right, if any, to an allowance for the stamps in question depended upon a right to set-off against the price paid for the stamps by the Crown the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. But no such right of set-off exists against the Crown.

4. The Crown was not bound by the acceptance of the stamps by its officer. Whether in accepting them he knew or did not know how they were produced, was immaterial. In neither case could any request or authority for the production and delivery of the stamps be implied against the Crown.

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5. The Crown having consented to allow the company the fair cost of production of the stamps, without any profit to the company :

Held, that as the company had no right of set-off, it must accept the allowance proposed by the Crown or nothing, and that the "fair cost of production" was not necessarily the cost to the company or to any particular person ; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps.

Statement of Facts.

THIS was an information exhibited to recover from the defendant company moneys alleged to have been wrongfully received by it from the Crown, and for damages for breaches of certain contracts made between the parties for the production and supply of revenue stamps.

Upon the hearing of the case it appeared that certain stamps had been produced from stone instead of from steel as required by the contracts, and a reference was directed to the Registrar to enquire and report as to the quantity of stamps so produced, and as to the damages, if any, arising to the Crown therefrom. Upon the reference a dispute having arisen, between the parties, as to whether the question of the measure of damages upon the alleged breach of the contracts had been decided at the trial, the Registrar, under rule No. 17 of the General Order of December 12th, 1899, submitted such question for the decision of the court.

February 7th, 1901.

The argument of the question submitted by the Registrar was now proceeded with.

F. H. Chrysler, K.C. for the plaintiff, contends that all the Crown is obliged to do, under a view of the law most favourable to the defendant, is to allow it the cost of producing the stamps by the lithographic process. *Peruvian Guano Co.* v. *Dreyfus* (1). Perhaps the better way of putting it, would be this: The moneys paid for the lithographed stamps under the

(1) [1892] A. C. 166.

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assumption that they were what was called for by the contract, should be restored to the Crown, allowance being made to the defendant for the cost of production only. (*Bulli Coal Co.* v. *Osborne* (1). Of course the lapse of time does not bar the Crown's right to recover the money back—*Nullus tempus occurrit regi* ; and, moreover, lapse of time is never available as a defence where there is fraud.

The price of engraved stamps can only be recovered upon delivery of the same according to contract. To recover the price of lithographed stamps, or retain the price of the same, the defendant must show somewhere, or in some way, an implied contract to supply lithographed stamps. An implied contract cannot be assigned upon the mere user by the Crown of the lithographed stamps, because the Crown was unaware of the fact that the stamps were other than those the contract called for. It is only when the circumstances are such that the purchaser has an opportunity to refuse or receive the goods contracted for that an implied contract can be invoked. *Appleby* v. *Myers* (2) ; *Sumpter* v. *Hedges* (3) ; *Sherlock* v. *Powell* (4) ; *Forman & Co.* v. *The "Liddesdale"* (5) ; *Metcalfe* v. *Britannia Iron Work Co.* (6) ; *Smith's L. C.* (7) ; *Clough* v. *L. & N. W. Ry. Co.* (8) ; *Morrison* v. *Universal Marine Ins. Co.* (9).

There was nothing we could do that we have not done. We only discovered the fraud after we had used the stamps. (*Aaron's Reefs* v. *Twiss* (10) ; *Heilbutt* v *Hickson* (11) ; *Urquhart* v. *McPherson* (12) ; *Clarke* v. *Dickson* (13) ; *Fraser* v. *McLean* (14) ; *Newbigging* v. *Adam* (15).

(1) [1899] App. Cas. 351 at p. 362.
(2) L. R. 2 C. P. at pp. 651-659.
(3) [1898] 1 Q. B. at pp. 673 676.
(4) 26 Ont. A. R. 407.
(5) [1900] A. C. at pp. 190-202.
(6) 2 Q. B. D. at pp. 423, 426, 428.
(7) Vol. 2, p. 31.
(8) L. R. 7 Ex. 26, 34.
(9) L. R. 8 Ex. 197.
(10) [1896] A. C. at pp. 273, 290, 294.
(11) L. R. 7 C. P. 438.
(12) 3 App. Cas. at pp. 831, 837.
(13) El. B. & El. 148.
(14) 46 U. C. Q. B. 302.
(15) 34 Ch. D. at pp. 582, 592 ; 13 App. Cas. at pp. 308, 322, 330.

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This is a case where there is no contract; a position we take here, because the goods delivered were not those contracted for. There is a total failure of consideration. (*Boulton* v. *Jones* (1); *Cundy* v. *Lindsay* (2); *Erlanger* v. *New Sombrero Phosphate Co.* (3).

We do not seek to rescind the contract for the delivery of engraved stamps; we simply want to get back the money we paid for the lithographed stamps, and we are willing to allow the actual cost of the same.

February 13th, 1901.

F. H. Chrysler, K.C., resumed his argument, citing from the language of Blackburn, L.J., in *Erlanger* v. *New Sombrero Phosphate Co.* (4) as follows:

"It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum.* The parties must be put *in statu quo.* * * * * It is a doctrine which has often been acted upon both in law and equity." But we do not seek for rescission, and I merely refer to this case to show that the principles governing cases such as this are the same in law and equity. Later on in the case Lord Blackburn says:

"But as a court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost." I would refer also to *Lagunas Nitrate Company* v. *Lagunas Syndicate* (5); *Peek* v. *Derry* (6); *Redgrave* v. *Hurd* (7).

(1) 2 H. & N. 564.
(2) 3 App. Cas. 459.
(3) 3 App. Cas. at pp. 1218, 1277.
(4) 3 App. Cas. at p. 1278.
(5) [1899] 2 Ch. 392.
(6) 37 Ch. D. 541; 14 App. Cas. 337.
(7) 20 Ch. D. 1.

We claim that the Crown is entitled to recover back the full amount paid for engraved stamps, and that no allowance should be made to the defendant company beyond the actual cost of producing the lithographed stamps, on the ground that there never was a contract entered into by any one on behalf of the Crown for the lithographed stamps, nor any acceptance by or on behalf of the Crown, binding it to pay for them.

We are willing that the defendant should have the cost of production of these stamps, but no profit should be allowed the company because there was no contract for the manufacture of them.

The Solicitor General of Canada followed for the plaintiff. The English law applicable to cases of this description does not differ materially from the civil law. *Kennedy* v. *Panama, &c. Mail Company* (1); *Broom's Legal Maxims* (2). Then the case may be viewed with advantage from the standpoint of the law of the Province of Quebec.

In the first place, I would direct the attention of the court to the peculiar fact that while the formal contracts subsisting between the Crown and the defendant has been repeatedly referred to as contracts of sale, I do not find the elements of a contract of sale in them at all. Under article 1486 *C. C. L. C* it is stated that "Everything may be sold which is not excluded from being an object of commerce by its nature or destination or by special provision of law." These stamps are not a saleable commodity, they are not articles of merchandise. *American Brewing Co.* v. *United States* (3).

As I have said it is not a contract of sale, but an innominate contract. (Article 1683, *C. C. L. C.*) But if it were a contract of sale, the contract would have failed entirely, under the law of the Province of

(1) L. R. 2 Q. B. at p. 587. (2) 7th ed. p. 568.
(3) 33 Ct. of Clms. 348.

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Quebec, for want of consideration. We have not received what we engaged to pay for.

Then, taking the most lenient view of the case, eliminating altogether the question of fraud, the position of the parties would be, that when the purchaser, assuming it to be a contract of sale, had discovered the defect in the thing sold, his obligation would have been to tender back the thing that he had in his possession, and to recover the price he had paid therefor. Under the English law that would be an example of *restitutio in integrum*. Now, then, if the Crown handed back the stamps to him what would it benefit him? They are not marketable; he could not dispose of them to anyone; they have no value in themselves. Under the *Inland Revenue Act* they must be destroyed. (See *Inland Revenue Act* secs. 280, 324 and 326; *Criminal Code*, sec. 435)

I would refer to Article 1527 C. C. L. C. for the law governing the effect of the dissolution of the contract even if there had been a mistake in good faith on the part of the contractor. The contractor would be entitled to get back his goods, and we would be entitled to get back our money; but the contractor would have to deliver up the stamps to be destroyed, if the authorities of the Inland Revenue Department so ordered. That is the exact legal position.

There is a Scotch case closely in point with this case, *Jaffe* v. *Ritchie* (1). That was a case in which a sale took place of flax yarn, and after the yarn had been delivered and accepted by the plaintiff and partly converted into cloth it was discovered that the yarn was tainted with jute. It was a sale by description; the plaintiff recovered back not only the price that he had paid for the yarn, but damages also.

(1) 23 C. of Sess. 2nd ser. 242.

I would also refer to *Larombière* (1); *Fuzier-Herman* (2); *Dalloz* vo. *Vente* (3); 2 *Pothier* (4); *Varley* v. *Whipp* (5). Arts. 1486, 1522, 1526, 1527 and 1683, C. C. L. C.

W. D. Hogg, K.C. for the defendant;

The position which the defendant takes in this action is that five separate contracts were made with the Crown, and that it has been alleged that there has been a breach of those contracts. That is the allegation. It is true that the defendant has admitted from the beginning that during the period that these contracts existed large quantities of stamps which were printed from steel transferred to stone were delivered, and were accepted and used by the Crown. But what we say is that we have produced stamps which, from the evidence of the Commissioner of Inland Revenue, were perfectly suitable and satisfactory for all the purposes of the Government. They were originally printed from steel but multiplied from stone. No consequential or special damage of any description has ever taken place according to the evidence. When there is no evidence of such damage the motives or intentions of the contractor have nothing to do with the enquiry. *Mayne on Damages* (6); *Thorpe* v. *Thorpe* (7).

In the *American and English Encyclopædia of Law* (8) the rule as to damages for breach of contract is stated to be, except in cases of breach of promise of marriage, the actual damage caused by the breach, and the damage is there defined to be the pecuniary loss which

(1) Tome I. No. 2, p. 522.
(2) *C. C. Annoté*, tome 3, No. 74, p. 28, and No. 36, p. 110.
(3) Tome 43, p. 671.
(4) Bugnet's ed. pp. 80, 81; Nos. 166 and 168.
(5) [1900] 1 Q. B. 513.
(6) P. 43.
(7) 3 B. & A. 580.
(8) 2nd ed. vol. 8, p. 639.

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the complaining party has suffered, and the law takes no notice of the motives of the party in default.

Whether it is a simple breach of contract, or whether it is a breach of contract resulting from deceit or fraud, the latest authorities upon the subject maintain that the duty of the court is to administer the rule in precisely the same way. In cases of fraud the rule of damages is the same as in the action on a warranty, namely, the difference between the actual value of the thing received, and the value of the article if it really were what it purported to be. *Mullett* v. *Mason* (1); *Benjamin on Sales* (2).

In *Church* v. *Abell* (3) the facts were much stronger against the contractor than here. That was a case in which a water-wheel that was contracted for was defectively made, and not according to specifications, something happened which made it utterly valueless, but the Supreme Court of Canada applied the rule I contend for here, namely, the difference between the value of the article delivered and the contract price.

I say that the measure of damages here should be the difference between the value of the stamps which were actually delivered and used, and the value of the stamps called for by the contract *Mondell* v. *Steel* (4); *Street* v. *Blay* (5); *Davis* v. *Hedges* (6); *Basten* v. *Butler* (7); *Cutter* v. *Powell* (8); *Hudson on Building Contracts* (9).

We gave the Crown something which the evidence shows was useful and satisfactory for the purposes to which it was applied. We are entitled to have that value deducted from the amount paid by the Crown

(1) L. R. 1 C. P. 559.
(2) 7th ed. (Bennett) p. 964.
(3) 1 S. C. R. 442.
(4) 8 M. & W. 858.
(5) 2 B. & Ad. at p. 462.
(6) L. R. 6 Q. B. 687.
(7) 7 East 479.
(8) 2 Smith's L. C. 1.
(9) 2nd ed. p. 395.

as for the article contracted for. *Dingle* v. *Hare* (1); *Jones* v. *Just* (2).

T. C. Casgrain, K.C. follows for the defendant. This case is not so much an action for breach of contract as it is one for the recovery of money paid without consideration being received therefor. Let us apply the law of the Province of Quebec, the civil law, to the questions arising in the case. We shall find that such law, so far as it is applicable to this case, conforms to the law of England.

It is contended, then, on behalf of the defendant, that the only sum recoverable by the Crown here is the actual pecuniary loss that the Government has sustained. What are damages? According to Article 1073 *C. C. L. C* the damages due to the creditor are in general the amount of the loss that he has sustained, and of the profit of which he has been deprived. See also articles 1074 and 1075 *C. C. L. C.* as to where the party has been guilty of fraud. *Pothier on Obligations* (3); *Fuzier-Herman, (Repertoire)* vo. *Dommages-Intérêts* (4); *Mayne on Damages* (5).

I submit that upon the evidence the defendant has not been guilty of fraud or deceit. This entirely displaces the theory of counsel for plaintiff, that all that defendant is entitled to is the actual cost of producing the stamps, because if such a principle were acted upon it would amount to punishing the defendant company as if a crime or offence had been committed against the Government by it, and with such a matter this court has nothing to do in these proceedings. The actual net cost is not the value of the stamps, not the value of the thing which the Crown has received and by which it benefited and profited.

(1) 7 C. B. N. S. 145.
(2) L. R. 3 Q. B. 197.
(3) (Evans ed.) Vol. i, Nos. 159, 160, 161, 162, 163, 166, 167.
(4) No. 102.
(5) 5th ed. pp. 10, 44, 45, 196.

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The skill and experience of those who produced them must be taken into account in estimating their real value.

So far as the proper inference to draw from the mutual dealings of the parties is concerned, I submit it is just as fair to assume that the Government knew all along that the stamps in question were lithographed stamps, and that they accepted them as such, as it is to presume that a fraud was perpetrated upon the Government, and that it was through fraud, misrepresentation and deceit that the stamps were accepted and used by the Government. Fraud cannot be presumed under the law of the Province of Quebec or under the law of England.

The court ought simply to reduce the price of the stamps supplied by the process of lithography, and which were paid for at contract rates. *Stewart* v. *Atkinson* (1); *Sedgewick on Damages* (2); *Addison on Contracts* (3); *Sigafus* v. *Porter* (4); *Smith* v. *Bolles* (5).

F. H. Chrysler, K.C. replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 9th, 1901,) delivered judgment.

The information is exhibited to recover from the defendant company moneys alleged to have been wrongfully received by it, and for damages for breaches of certain contracts made between the parties for the production and supply of revenue stamps. On the hearing of the case it appeared that the company had for many years been under contract with the Government to furnish, among other things, revenue stamps to be used in the collection of the revenue. There were five principal contracts. Under the first of these,

(1) 22 S. C. R. 315.
(2) Sec. 759, p. 466.
(3) 8 ed. pp. 952, 989, 998.
(4) 179 U. S. 116.
(5) 132 U. S. 125.

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made in 1868, the company in terms agreed to print the stamps therein mentioned from steel plates. There was a question as to whether or not revenue stamps were included in this contract, and that question has not been decided, but is still open. By the second contract made in 1873 the company again in terms undertook that the stamps therein mentioned, including revenue stamps, should be printed from steel plates. The later contracts, which in terms include revenue stamps, do not, so far as I can see, contain any express covenant to print such stamps from steel plates; but it was agreed that the stamps should be produced in the highest style of art current from time to time, and that not more than thirty thousand impressions should be taken from any plate without retouching the same. In all cases the plates were to be of steel, and the company was to engrave them. This the Crown contends is in each case a contract to furnish revenue stamps printed from steel plates. That question is also open, and may come up for decision on any motion for judgment that may hereafter be made in this case. It is not necessary to decide, or even to discuss it now. It further appeared that while some of the revenue stamps produced by the company and delivered to the officers of the Crown, were printed from steel plates, others so delivered were printed from stone, the stamps being produced by a transfer from the steel plate to stone. The latter were without doubt produced in a high style of art, and so far as appears from the evidence answered the purpose for which such stamps are intended as well as if they had been printed from steel. The reproduction or imitation was so good that an ordinary man could not, I think, without instruction detect the difference. In fact it appeared that even experts could be deceived; and the evidence given by one of the witnesses to that effect derived strong

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corroboration from the fact that in respect of one of the stamps produced in court there was a direct conflict of opinion between the expert witnesses examined as to whether it was printed from a steel-plate or from stone. The motives of the Government in contracting for stamps printed from steel plates, or the reasons that induced them to stipulate therefor, are not of course material. Whatever the motives or reasons were the Crown was entitled to get the thing it bargained for, and not something else. But it may not be amiss in passing to say that the reason why in such cases stamps printed from steel plates are desired is that they are thought in that way to be produced in the highest style of the art, and to be less liable to be counterfeited.

It also appeared that in certain cases the proper officer of the Crown had ordered revenue stamps, knowing and intending that they should be printed from stone. All such cases, counsel for the Crown not objecting, I excluded from the scope of the enquiry. There was also evidence to show that in some cases, and to some extent, the company had furnished revenue stamps printed from stone, when under the contract in existence at the time, it ought to have furnished stamps printed from steel plates; and I directed a reference, with the consent of the parties, to Mr. Dawson, the King's Printer and to Mr. Audette, the Registrar of the Court, to enquire and report as to the cases in which under all the contracts in question the contract calls for printing from steel plate and the work was done by transfer to stone; and also in respect of damages arising therefrom. Mr. Dawson declining to act, the order of reference directed the enquiry and report to be made by Mr. Audette. In the course of that enquiry, which I understand is nearly concluded, a question has arisen as to what allowance should be

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made to the defendant company for the stamps printed from stone that were, instead of stamps printed from steel, delivered to the Department of Inland Revenue and used for the purpose of collecting the revenue. For the Crown it is contended that only the fair cost of production should be allowed, it being, it is argued, against equity and good conscience that the company should make a profit out of its own wrong. The contention of the latter is that it should be allowed such fair cost plus a fair profit. That perhaps is not exactly the way in which the company puts its contention; but that, I think, we shall see is what it comes to. That question and difference between the parties, the earned referee has, in accordance with the rule applicable to such cases (Rules of December 12th, 1899, no. 17), submitted to the court for decision.

Now, before approaching the question more closely, t will, I think, be convenient to refer briefly to three matters that ought, in discussing it, to be kept in mind. First, as to the jurisdiction of the court: That, n this case depends upon clause (*d*) of the 17th section of *The Exchequer Court Act* (1) which, in substance provides that the court shall have and possess concurrent original jurisdiction in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. And where in any matter, not otherwise provided for, there is any conflict between the rules of equity and the rules of common law with reference to the same matter the rules of equity prevail (2).

Then it is to be borne in mind that the contract is made with the Crown, and that the Crown should not "suffer by the negligence of its officers, or," if that

(1) 50-51 Vict. c. 16.

(2) *The Exchequer Court Act*, s.21, Rule 1 (May 1st, 1895,) Audette's Practice, 217; and The Supreme Court of Judicature Act, 1873 (33 & 37 Vict. (U.K.) c. 66, s. 25 (11).

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should happen, "by their compacts or combination with the adverse party" (1). *The Queen* v. *Bank of Nova Scotia*, (2) *The Queen* v. *Black* (3), *Black* v. *The Queen* (4).

It will be observed, and that is an important consideration, that revenue stamps are not articles of merchandise. They are the means or instruments used in the collection of the revenue. No one has a right to print or produce them except under a contract with the Crown or by its authority. In the hands of one who, without such authority prints them, or has them printed for him, they are of no value, and if a contractor print revenue stamps that the Government is not bound to accept under some contract with him, and the Government refuses to accept them, it is n t possible for him in any way to indemnify himself for the labour, materials and money expended in their production. In his hands they are of no more value than so much waste paper. Perhaps not even of that value, for it seems reasonable that the Crown in such a case should for the protection of the revenue have a right to compel the contractor to destroy them.

Coming now to the issues to be determined, and confining the enquiry to cases in which the company contracted to deliver revenue stamps printed from steel plates, but delivered in lieu thereof stamps printed from stone, the first question one asks of himself is whether or not the thing delivered was the thing contracted for, or the thing contracted for with some defect or imperfection warranted against, or whether it was a different thing? And the answer to these questions, it seems to me, is that it was neither the thing that was bargained for, nor that thing with a defect or

(1) Chitty's Prerogative of the Crown, 379.
(2) 11 S. C. R. 11.
(3) 6 Ex. C. R. 253.
(4) 29 S. C. R. 699.

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imperfection. A stamp printed from a steel plate is one thing, and a stamp produced by a transfer from the steel plate to a stone is another and different thing. Both may be revenue stamps, if the Government sees fit to use them for that purpose; but they are distinct and different things. The stamps printed from stone may be, and in the cases in question here, were reproductions of stamps printed from the steel plates; but they were not the same thing, or the same with a defect or fault. No one would, I fancy, with reference to pictures, say that a reproduction of a steel engraving was the same as the original engraving printed from the steel plate, and there is no difference in principle when the thing produced is a stamp and not a picture. The distinction may be further illustrated by reference to a clause in some of the contracts whereby the company undertook to print the stamps at Ottawa or at Montreal. Now if the contract were to print from steel plates at Ottawa and the company printed from steel plates at Montreal, it would produce what was bargained for, but there would be a breach of the contract to print at the place named. In that case the contract having been executed by delivery of the stamps, the Crown's action would be upon the breach of the contract. But when the company agrees to print stamps from steel plates and prints them from stone, it does not produce the thing bargained for but another and different thing, and the Crown's action in such a case is to recover the money paid for something it never bargained for and never received.

If I am correct in this it follows that the public money having been paid out to the contractor for a thing the Crown never bargained for, and which was never delivered to it, the Crown is entitled to recover back the money so paid, and, I think, in the first instance, the full price paid for such reproductions deliv-

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ered as revenue stamps printed from steel plates. *Jones* v. *Ryde* (1); *Chapel* v. *Hickes* (2); *Young* v. *Cole* (3); *Westropp* v. *Solomon* (4); *Gormertz* v. *Bartlett* (5); *Gurney* v. *Wormsley* (6); *Nichol* v. *Godts* (7); *Joslin* v. *Kingsford* (8); and *Kennedy* v. *The Panama &c. Mail Coy.* (9). The allowance to be made to the defendant company for such reproductions is another matter. But before discussing that it may perhaps be well to consider the position in which the company would have been if the fact that the revenue stamps in question were reproductions had been discovered before the Crown had accepted them, or before it had paid for them. In the first case the Crown could without doubt have refused to accept them, and the company could have recovered nothing for them. Neither would the stamps have been of any value to them, for they could not have disposed of them to any one or in any way. The loss would have been complete. In the same way the Crown could have thrown back on the company's hands any unused reproductions in its possession when the discovery that they were reproductions was made, and if the price had been paid it could have been recovered in an action by the Crown, and if not paid the defendant could not in an action against the Crown have recovered the price agreed upon. But if the stamps had been accepted and used but not paid for, what then? Could the contractor have recovered the price? It is clear that he could not have recovered in an action on the contract, for he had not delivered the thing bargained for, and it is not clear that he could have recovered against the Crown on an implied contract to pay a fair price for the stamps. The case

(1) 5 Taunt. 487.
(2) 2 Cr. & Mees. 214.
(3) 3 Bing. N. C. 724.
(4) 8 C. B. at p. 371.
(5) 2 El. & B. 849.
(6) 4 El. & B. 133.
(7) 10 Ex. 191.
(8) 13 C. B. N. S. 447.
(9) L. R. 2 Q. B. 580.

differs in that respect from one between subject and subject. It has been held in this court that a promise may be implied as well against the Crown as against the subject to pay the fair value of work done or materials supplied, or service rendered. *Wood* v. *The Queen* (1); *Hall* v. *The Queen* (2); *Henderson* v. *The Queen* (3); *The Queen* v. *Henderson* (4). But that had reference to work done or materials supplied, or service rendered honestly and fairly in the ordinary course of business. And I am not at present prepared to hold, though that question need not be decided now, that if one contracts to furnish a specified thing to the Crown, and delivers a reproduction or imitation of it, and thereby deceives the officer of the Crown whose duty it is to receive it, he can recover against the Crown on a *quantum meruit* the fair value of such reproduction or imitation.

We come then to another point. A great many cases and authorities have been cited and discussed on the argument; and here I may say that although I do not refer to them, I have been at the pains to examine them all. A large number of the cases discussed have to do with the rescission of contracts, and the putting of the parties in the position they were in before the contract was made. But this is not a case of the rescission of a contract; and though the principles to be derived from such cases are of great value as furnishing analogies, they are not directly in point. But even in cases relating to the rescission of contracts, it has been held that the obligation to return the article received is limited to cases in which it is of some value to the opposite party; and that where it is of no value to the vendor it is not necessary to return it. What object could there be in returning to a contractor

(1) 7 S. C. R. 631.
(2) 3 Ex. C. R. 373.
(3) 6 Ex. C. R. 39.
(4) 28 S. C. R. 425.

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stamps that were of no value to him, and which ought at once to be destroyed? Any equity that might be thought to exist in favour of the company would arise because, the stamps having been used, the Crown has had a benefit therefrom; but as the use of them by the Crown was the natural consequence of the company's deception, it would even in that view of the case be necessary to consider whether a court of equity would interfere to save the company from the results of its wrongful act.

In the view I take of this case the defendant company's claim to an allowance depends in law upon its right to recover from the Crown the value of the stamps printed from stone, and delivered to the Crown's officer, and accepted by him, and used in collecting the revenue. I have already mentioned that question, and have said that I need not now decide it. The reason for that is that I think there is another and a fatal objection to its right to recover. It is well settled that a substantive cause of action cannot be pleaded as a counter-claim to an information by the Crown, and that a subject cannot plead a set-off in an action by the Crown. *The Queen* v. *Whitehead* (1); *The Queen* v. *The Montreal Woollen Mills Co.* (2); *Chitty's Prerogatives of the Crown* (3). If the gist of the present action were to recover damages for the breach of a warranty to print from steel plates the stamps in question—a matter to which I shall have occasion to refer again—then of course both the question of the money paid under the contract, and the value of the stamps delivered under it, would arise under the contract and come in question here, and the court would have to decide what amount should be allowed for the stamps accepted and used, against the money paid

(1) 1 Ex. C. R. 135. (2) 4 Ex. C. R. 348.
(3) P. 366

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for them. But in the view which, on consideration, I take of the case, the stamps printed from stone in the cases to which the reference is limited, were not delivered under the contract, but outside of it and against its terms. As I have already stated they were not the thing bargained for; not even that thing with some defect warranted against, or lacking some quality stipulated for. So it seems to me that in law the defendant's right to an allowance depends upon its right to set off against the price of the stamps the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. And no such right of set-off exists. It is a claim for which, if the Crown stood on its strict right, the company would have to bring its action against the Crown after having obtained a fiat for a petition of right, or a reference from the Head of the proper department.

On the hearing I expressed the view that the Government having taken the stamps printed from stone and used them, the company ought to be allowed for them what they were worth, but that it ought not to be allowed to retain the money paid for them in the belief that they were printed from steel plates. Taking the word "worth" to mean the fair cost of production, counsel for the Crown concur in that expression of opinion; and the Crown is willing and agrees that in the exercise of an equitable jurisdiction the court should ascertain and allow, in reduction of the amount that otherwise it would be entitled to recover, such fair cost of production without any profit to the company. So to that extent it is not necessary to determine whether the opinion expressed was well founded or not. If it were necessary to determine that question I should not, I fear, after having an opportunity for further considering the question, be able to maintain the opinion as applied to the present

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case. But on the other hand, it is clear that the stamps in question served the purpose for which those contracted for were intended. No special damages have been proved, and it is hardly suggested that any could have occurred. The Crown, and through it, the public, have had the benefit of the company's money, labour and materials in the production of the stamps, and no one can, I am sure, with reason be dissatisfied if the company is allowed the fair cost of producing such stamps. Not that the stamps so produced without authority were of value in themselves, or of value to the company, but because they have been of use to the Crown and public. But if an allowance is made to the company, not because it is in this proceeding entitled to it as a matter of law, but because the Crown consents, then the rule that the Crown proposes for ascertaining such allowance must of course be followed. If the company objects to that rule, then either the judgment should be entered for the full amount paid for the stamps in question, leaving the company to assert its rights in a cross-action against the Crown, or its right, if it have one, to sue for the difference between such allowance and a fair price for such stamps, should be expressly reserved.

In an ordinary action between subject and subject for a breach of warranty I should not have any difficulty in accepting the rule for the measure of damages proposed for my guidance by Mr. Hogg and Mr. Casgrain, namely, the difference between the value of the thing received and the value of such an article if it had been as represented to be. But here the stamps in themselves, as has been said, have no value. In the hands of the contractor, without the authority of the Crown to print them, they are worthless. If the Crown would buy them they would of

course be worth what it would be willing to pay for them. But the Crown was not in this case bound to take them under the contract, and it need not buy them unless it chose to do so. It did not in fact buy them, for it is clear from the evidence of Mr. Miall, the Deputy Minister of the Department of Inland Revenue, that he thought the stamps were delivered under the contract and that they were printed from steel plates. In another sense one might say that the stamps were worth what it cost to produce them, adding a fair profit thereon to the person who engraved and printed them. But then in such a case the person who produced them ought to have a right to do so, and that is something which without the authority of the Crown no one has a right to do. Revenue stamps are not things which anyone may print and sell. Another view of the measure of damages that suggests itself is what the company gained by delivering stamps printed from stone for stamps that ought to have been printed from steel. It is easy to see that it gained the difference in the cost in producing them in the one way and in the other; and a case might be suggested in which such a rule would do justice. In the present case it would have the merit of preventing the defendant company from making any gain by the substitution of one kind of stamps for the other, and on the other hand it would leave it with such gain or loss as it would otherwise have made out of the contract if that had been adhered to. But the defendant's gain is not always, perhaps not usually, the same as the plaintiff's loss, and, in general, damages must be assessed with reference to the latter's loss, and not to the former's gain.

The enquiry and the question submitted by the referee is, as has been observed, limited to cases in which stamps printed from stone were delivered under

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contracts by which stamps printed from steel plates were stipulated for. I have no reason to suppose that these contracts at the prices fixed were onerous and that the company in what was done desired to escape from them. The reason suggested by the President of the company is, if I understand him, that the stamps were printed from stone to expedite the work when the demand was pressing. But that reason does not appear to me to be an adequate reason. I cannot conceive of anyone in his senses doing what was done here and taking the risks that were taken, except for some object that moved him strongly. I think it more probable that what the company did was done to make larger gains than would otherwise have been possible. But one sees how in a case of this kind if the law would permit a contractor failing to collect or retain the contract price, to recover on the *quantum meruit*, a fair price including a fair profit, he could by the very excellence of the imitation or reproduction secure acceptance by the Crown's officer, and in that way turn an onerous contract into a beneficial one greatly to his advantage. And it makes no difference whether the substitution of one class of stamps for the other should be made to escape a loss or to make a greater gain. But it is clear, I think, that the Crown would not be bound by the acceptance of its officer, and whether in accepting them he knew or did not know how they were produced would be immaterial. In neither case could any request or authority for the production and delivery of the stamps be implied against the Crown.

And even if the information in this case were thought, in substance, to be an action on a warranty to print the stamps from steel plates, no court would, I think, make any greater allowance to the company than that which the Crown offers to submit to, unless

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it were bound to do so by some rule of law from which there was no way of escape. The ground urged in this case for adopting by reason of the conduct of the company a rule differing from the ordinary rule in such cases, is variously stated. It is said that it is against equity that a wrong-doer should profit by his own wrong; that a court of equity will never assist him in effectuating his wrongful purpose; that it will not interfere to save him from the just consequences of his own misconduct, and that the rules of equity should prevail. But these are considerations that affect probably the company's right to retain or recover anything, and not its right to retain or recover a fair price including a fair profit if otherwise it were entitled to be compensated for the stamps in controversy. But the question is one that need not be now decided. The rule proposed by counsel for the Crown does justice, I think, in the present case, and I am satisfied with it, not because I am convinced that it could be accepted as a good general rule in cases in which the defendant was entitled to recover, or set up in reduction of the amount for which otherwise there would be judgment, the value of the thing delivered, but because I am of opinion that in this proceeding the company defendant is not in a position to insist upon any allowance or set-off, and that it must accept that which the Crown offers or none.

The direction to the learned referee will be that he ascertain and report, as directed, the cases in which under the several contracts mentioned in the information filed herein, printing from steel plates was called for and in which the work supplied by the defendant company was done by transfer to stone; also the amounts paid by the Crown under the contracts to the company in respect of such work; and also the fair cost of production of such work. I use the word "work"

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as it was used in the order of reference; but I understand that there is no question except as to certain revenue stamps printed from stone that ought under the said contracts to have been printed from steel plates.

Perhaps I should add that the fair cost of production is not necessarily the cost to the defendant company or to any particular person; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps. The cost to the defendant company would of course be evidence, and in this case possibly satisfactory, though not conclusive evidence, of the fair cost of production.

As the contracts are not all in the same terms, and, as already mentioned, the questions arising upon such differences are still open, and may come up for determination on the motion for judgment, it would be well, I think, for the learned referee to distinguish between the cases arising under the different contracts.

As some time may elapse before this case comes on for judgment on motion therefor, the right of either party to appeal from any direction or decision now given, as well as from the order of reference made at the hearing, will be extended to the expiry of thirty days from the day on which final judgment may be pronounced.

Judgment accordingly.

Solicitors for plaintiff: *Chrysler & Bethune.*

Solicitors for defendant: *O'Connor, Hogg & Magee.*